Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NOEL D. McNEEL, JOYCE A. McNEEL
GLEN NIGHTENGALE, RUBY NIGHTENGALE

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NOEL D. McNEEL*
JOYCE A. McNEEL
P.O. BOX 2
CHANDLER, ARIZONA 85244
(602) 671-6299

GLEN NIGHTENGALE*
RUBY NIGHTENGALE
10437 W. RUTH AVENUE
PEORIA, ARIZONA 85345
(602) 972-3431

*PETITIONERS, IN PROPRIA PERSONA

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Ninth Circuit Court of Appeals exceeded the standard of review of the Tax Court's grant of the Respondent's Motion to Dismiss for Failure to State a Claim when the Court found facts not alleged in the Petition or that could not be inferred from the Petition?

2. Whether in exceeding its standard of review, the Ninth Court overlooked facts alleged in the Petition that would prove Petitioners' claim that their labor is received as a gift from their Creator and the gift of the labor is a gift for income tax purposes and as such is a gift for purposes of Internal Revenue Code, § 1015(a)?

THE PARTIES

The only parties are those who appear in the caption of the case.

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2. THE NINTH CIRCUIT'S JUDGMENT IGNORED THE PETITIONERS' CLAIM THAT THEIR LABOR, WHICH IS RECEIVED AS A GIFT FROM THEIR CREATOR, IS A GIFT FOR INCOME TAX PURPOSES AND AS SUCH IS A GIFT FOR

IRC, § 1015(a), AND THUS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. FURTHERMORE, BECAUSE THE ISSUE OF WHETHER THERE HAS BEEN A GIFT FOR INCOME TAX PURPOSES IS A QUESTION OF FACT, THE NINTH CIRCUIT HAS DECIDED AN ISSUE OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH SEVERAL APPLICABLE DECISIONS OF THIS COURT. 17

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The Petitioners, Noel D. McNeel and Joyce A. McNeel (McNeel), hereby Petition this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on July 3, 1995. The Petitioners, Glen Nightengale and Ruby Nightengale (Nightengale), hereby Petition this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on August 22, 1995.

OPINION OF THE COURT BELOW

Both the opinion of the Ninth Circuit Court of Appeals [App., (McNeel, Pgs. A-1 to A-2; Nightengale, Pgs. B-1 to B-2)][1] and the United States Tax Court [App., (McNeel, Pgs. A-5 to A-10; Nightengale, Pgs. B-5 to B-10)] were unpublished and are in the Appendix.

JURISDICTION

The Ninth Circuit Court of Appeals entered judgment in McNeel on July 3, 1995 (App., Pgs. A-1 to A-2) and in Nightengale on August 22, 1995 (App., Pgs. B-1 to B-2) affirming the Tax Court's dismissal for failure to state a claim. On August 11, 1995, the McNeels filed a Petition for Rehearing. On October 26, 1995, the Ninth Circuit denied the McNeels' Petition for Rehearing. (App., Pg. A-3). On October 4, 1995, the Nightengales filed a Petition for Rehearing. On October 26, 1995, the Ninth Circuit denied the Nightengales' Petition for Rehearing. (App., Pg. B-3) The jurisdiction of this Court to review the judgment of the Ninth Court of Appeals by writ of certiorari is invoked under the provisions of 28 USC, § 1254(1) and 26 USC, § 7482(a).

1/ The Appendix is divided into Appendix A for the McNeels and Appendix B for the Nightengales. References to pages will be A-(page #) for the McNeels and B-(Page #) for Nightengales.

STATUTORY PROVISIONS INVOLVED

The following statutes and rules are involved in this petition.[2]

Sec. 61. Gross income defined.

(a) General definition. Except as otherwise provided in this subtitle, gross income means all income from whatever source derived, including (but not limited to) the following items:

(1) Compensation for services, including fees, commissions, fringe benefits, and similar items;
(2) Gross income derived from business;
(3) Gains derived from dealings in property;
(4) Interest;
(5) Rents;
(6) Royalties;
(7) Dividends;
(8) Alimony and separate maintenance payments;
(9) Annuities;
(10) Income from life insurance and endowment contracts;
(11) Pensions;
(12) Income from discharge of indebtedness;
(13) Distributive share of partnership gross income;
(14) Income in respect of a decedent; and
(15) Income from an interest in an estate or trust.

2/ All references to the statutes are found in the Internal Revenue Code of 1986 unless otherwise noted.

Sec. 83. Property transferred in connection with performance of services.

(a) General rule. If in connection with the performance of services, property is transferred to any person other that the person for whom such services are performed, the excess of --

(1) the fair market value of such property (determined without regard to any restriction other than a restriction which by its terms will never lapse) at the first time the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, over

(2) the amount (if any) paid for such property,

shall be included in the gross income of the person who performed such services in the first taxable year in which the rights of the person having the beneficial interest in such property are transferable or are not subject to a substantial risk of forfeiture, whichever is applicable. The preceding sentence shall not apply if such person sells or otherwise disposes of such property in an arm's length transaction before his rights in such property because transferable or not subject to a substantial risk of forfeiture.

Sec 165. Losses.

(b) Amount of deduction. For purposes of subsection (a), the basis for determining the amount of the deduction for any loss shall be the adjusted basis provided in section 1011 for determining the loss from the sale or other disposition of property.

Sec. 1001. Determination of amount of and recognition of gain or loss.

(a). Computation of gain or loss. The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 1011 for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

Sec. 1011. Adjusted basis for determining gain or loss.

(a) General rule. The adjusted basis for determining the gain or loss from the sale or other disposition of property, when acquired, shall be the basis (determined under section 1012 or other applicable sections of this subchapter and subchapters C (relating to corporate distributions), and P (relating to capital gains and losses)), adjusted as provided in section 1016.

Sec. 1012. Basis of property -- cost.

The basis of property shall be the cost of such property, except as otherwise provided in this subchapter and subchapter C (relating to corporate distributions and adjustments), K (relating to partners and partnerships), and P (relating to capital gains and losses). The cost of real property shall not include any amount in the respect of real property taxes which are treated under section 164(d) as imposed on the taxpayer.

Sec. 1015. Basis of property acquired by gifts and transfers to trust.

(a) Gifts after December 31, 1920. If the property was acquired by gift after December 31, 1920, the basis shall be the same as it would be in

the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that if such basis (adjusted for the period before the date of the gift as provided in section 1016) is greater than the fair market value of the property at the time of the gift, then for the purpose of determining loss the basis shall be such fair market value. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the Secretary shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Secretary finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the Secretary as of the date or approximate date at which, according to the best information that the Secretary is able to obtain, such property was acquired by such donor or last preceding owner.

Rules of Practice and Procedure
UNITED STATES TAX COURT

Rule 40. Defenses and Objections Made by Pleading or Motion.

Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the option of the pleader, be made by motion: (a) lack of jurisdiction, and (b) failure to state a claim upon which relief can be granted. If a pleadings sets forth a claim for relief to which the adverse party is not required to file a responsive pleading, then such party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting failure to state a claim on which relief can be granted, matters outside

the pleading are to be presented then motion shall be treated as one for summary judgment and disposed of as provided in Rule 121, and the parties shall be given an opportunity to present all material made pertinent to a motion under Rule 121.

STATEMENT OF THE CASE AND FACTS FOR McNEEL

During the year 1986, Petitioner Noel D. McNeel sold his labor to various companies and provided construction work. For that labor he received $18,444.00. Petitioner had a basis (cost) of $18,444.00 in the labor he sold to the various companies for the construction work [TCP[3], ¶ 6(f); App., Pg. A-16][4]. During the year 1987, Petitioner Noel D. McNeel sold his labor to various companies and provided construction work. For that labor he received $12,620.00. Petitioner had a basis (cost) of $12,620.00 in the labor he sold to the various companies for the construction work [TCP, ¶ 6(g); App., Pg. A-16]. During the year 1988, Petitioner Noel D. McNeel sold his labor to various companies and provided construction work. For that labor he received $6,239.00. Petitioner had a basis (cost) of $6,239.00 in the labor he sold to the various companies for the construction work [TCP, ¶ 6(h); App., Pg. A-16]. During the year 1989, Petitioner Noel D. McNeel sold his labor to various companies and provided construction work. For that labor he received $17,824.00. Petitioner had a basis (cost) of $17,824.00 in the labor he

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3/ TCP refers to the Petition filed in the United States Tax Court. The Petition for the McNeels is found in Appendix A, Pages A-11 through A-18, inclusive. The Petition for the Nightengales is found in Appendix B, Pages B-11 through B-18, inclusive.

4/ The facts stated herein are taken from the Petition filed by the McNeels in the United States Tax Court. See Footnote 3 above for the location of the Petition in the Appendix.

sold to the various companies for the construction work [TCP, ¶ 6(i); App., Pg. A-16]. During the year 1990, Petitioner Noel D. McNeel sold his labor to various companies and provided construction work. For that labor he received $7,932.00. Petitioner had a basis (cost) of $7,932.00 in the labor he sold to the various companies for the construction work [TCP, ¶ 6(j); App., Pg. A-16]. During the year 1991, Petitioner Noel D. McNeel sold his labor to various companies and provided construction work. For that labor he received $8,507.00. Petitioner had a basis (cost) of $8,507.00 in the labor he sold to the various companies for the construction work [TCP, ¶ 6(k); App., Pg. A-17].

During the year 1986, Petitioner Joyce A. McNeel sold her labor to Burger King. For that labor she received $2,803.00. Petitioner had a basis (cost) of $2,803.00 in the labor she sold to Burger King [TCP, ¶ 6(l); App., Pg. A-17]. During the year 1988, Petitioner Joyce A. McNeel sold her labor to Luby's Cafeterias, Inc. For that labor she received $9,643.00. Petitioner had a basis (cost) of $9,643.00 in the labor she sold to Luby's Cafeterias, Inc. [TCP, ¶ 6(m); App., Pg. A-17]. During the year 1989, Petitioner Joyce A. McNeel sold her labor to Luby's Cafeterias, Inc. For that labor she received $7,906.00. Petitioner had a basis (cost) of $7,906.00 in the labor she sold to Luby's Cafeterias, Inc. [TCP, ¶ 6(n); App., Pg. A-17]. During the year 1990, Petitioner Joyce A. McNeel sold her labor to Luby's Cafeterias, Inc. For that labor she received $9,954.00. Petitioner had a basis (cost) of $9,954.00 in the labor she sold to Luby's Cafeterias, Inc. [TCP, ¶ 6(o); App., Pg. A-17]. During the year 1991, Petitioner Joyce A. McNeel sold her labor to Luby's Cafeterias, Inc. For that labor she received $9,890.00. Petitioner had a basis (cost) of $9,890.00 in the labor she sold to Luby's Cafeterias, Inc. [TCP, ¶ 6(p); App., Pg. A-17].

Petitioner Noel D. Mcneel is a Man and Joyce A. McNeel is a Woman created by God Almighty. The McNeels' Life is given to them each day as an endowment (gift) from their Creator. The McNeels' labor is their property. To the best knowledge of the McNeels, the McNeels' Creator is the original owner and creator of the McNeels' labor. The McNeels receive this labor each day as a part of the gift of their life. The McNeels received this gift after December 31, 1920. The McNeels have been unable to determine the basis (cost) their Creator had in the labor at the time the labor was given to them. [TCP, ¶ 6(e); App., Pg. A-15].

On August 26, 1993, the Respondent (hereinafter Commissioner) issued a Notice of Deficiency for the years 1986 through 1991. The Notices set forth deficiencies for Noel D. McNeel for the year 1986 of $1,235.00; for the year 1987 of $321.00; for the year 1988 of $521.00; for the year 1989 of $1,241.00; for the year 1990 of $626.00; and, for the year 1991 is $781.00. The Deficiency in taxes determined for Joyce A. McNeel for the year 1986 is $1,235.00; for the year 1987 is $321.00; for the year 1988 is $521.00; for the year 1989 is $1,241.00; for the year 1990 is $626.00; and, for the year 1991 is $686.00, plus penalties and interest for both. The Deficiencies were based upon the erroneous presumption that the Petitioner Noel D. McNeel had a **ZERO** basis (cost) in the labor he sold to various construction companies during the years 1986 through 1991 and that Joyce A. McNeel had a **ZERO** basis (cost) in the labor she sold to Burger King and Luby's Cafeteria during the years 1986 through 1991. Based upon this erroneous conclusion, probably based in part on the erroneous W-2's issued by the various construction companies, Burger King and Luby's which declared that the McNeels were paid "Wages," the Commissioner determined that all of the

monies received by the McNeels for the sale of their labor during the years 1986 through 1991 constituted "Wages."

On February 4, 1994, the McNeels filed their formal petition in this action. The McNeels alleged that the Commissioner erred in proceeding as if the McNeels had a **ZERO** basis (cost) in their labor [TCP, ¶ 5(e) and (o); App., Pg. A-13 to A-14]. As they are set forth above, the Petition then set down sufficient facts for the Petitioners' claim that they had a basis (cost) in their labor that was at least equal to the **FAIR MARKET VALUE** of the labor they sold to the various construction companies, Burger King and Luby's during the years 1986 through 1991.

On March 18, 1994, the Commissioner filed a Motion to Dismiss for Failure to State a Claim upon which Relief could be Granted. The Commissioner argued that the Courts have repeatedly rejected the notion that one can have a basis (cost) in one's own labor. On March 23, 1994, the Court ordered the McNeels to respond to the Motion to Dismiss, to file a second amended Petition and oral argument in Phoenix, Arizona on June 2, 1994. On May 6, 1994, the McNeels responded to the Motion to Dismiss and countered with a Motion for Summary Judgment. The Court denied the Motion for Summary Judgment on May 27, 1994. Oral argument was held in Phoenix, Arizona on June 2, 1994 and the Court entered an oral bench opinion on that date. (App., Pgs. A-7, A-8 and A-9). On July 29, 1994, the Court granted the Commissioner's Motion to Dismiss and entered its Order and Decision (App., Pgs. A-5 and A-6)

On August 27, 1994, the McNeels filed their Motion to Vacate or Revise Decision. The Tax Court denied the Motion on September 7, 1994. On December 3, 1994, the McNeels filed their Notice of Appeal. The Ninth Circuit entered its Judgment on July 3, 1995. (App., Pgs. A-1 and A-2). The McNeels filed their Petition for Rehearing

on August 11, 1995, which was denied on October 26, 1995. (App., Pg. A-3). It is the July 3, 1995 decision of the Ninth Circuit Court of Appeals for which McNeels seek review in this Court by certiorari.

STATEMENT OF THE CASE AND FACTS FOR NIGHTENGALE

During the year 1988, Petitioner Glen Nightengale sold his labor under contract while doing his landscaping work. For that labor he received $23,115.00. Petitioner had a basis (cost) of at least $23,115.00 in the labor he sold while doing his landscaping work. [TCP, ¶ 6(f); App., Pg. B-15][5]. During the year 1989, Petitioner Glen Nightengale sold his labor under contract while doing his landscaping work. For that labor he received $23,200.00. Petitioner had a basis (cost) of at least $23,200.00 in the labor he sold while doing his landscaping work. [TCP, ¶ 6(g); App., Pg. B-15]. During the year 1990, Petitioner Glen Nightengale sold his labor under contract while doing his landscaping work. For that labor he received $23,165.00. Petitioner had a basis (cost) of at least $23,165.00 in the labor he sold while doing his landscaping work. [TCP, ¶ 6(h); App., Pgs. B-15 to B-16]. During the year 1991, Petitioner Glen Nightengale sold his labor under contract while doing his landscaping work. For that labor he received $24,000.00. Petitioner had a basis (cost) of at least $24,000.00 in the labor he sold while doing his landscaping work. [TCP, ¶ 6(i); App., Pg. B-16]

During the year 1988, Petitioners Glen and Ruby Nightengale jointly sold their labor under contract to Nutrition for Life. For that labor they jointly received

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5/ The facts stated herein are taken from the Petition filed by the Nightengales in the United States Tax Court. See Footnote 3 on Page 6 above for the location of the Petition in the Appendix.

$6,956.00. The Nightengales had a combined basis (cost) of at least $6,956.00 in the labor they sold to Nutrition for Life. [TCP, ¶ 6(j); App., Pg. B-16]. During the year 1989, Petitioners Glen and Ruby Nightengale jointly sold their labor under contract to Nutrition Express and Santa Rosa Sales. For the labor they sold to Nutrition Express they jointly received $19,694.00. The Nightengales had a combined basis (cost) of at least $19,694.00 in the labor they sold to Nutrition Express. For the labor they sold to Santa Rosa Sales they received $880.00. The Nightengales had a combined basis (cost) of at least $880.00 in the labor they sold to Santa Rosa Sales. [TCP, ¶ 6(k); App., Pg. B-16]. During the year 1990, Petitioners Glen and Ruby Nightengale jointly sold their labor under contract to Nutrition Express. For that labor they jointly received $8,165.00. The Nightengales had a combined basis (cost) of at least $8,165.00 in the labor they sold to Nutrition Express. [TCP, ¶ 6(l); App., Pg. B-16]. During the year 1991, Petitioners Glen and Ruby Nightengale jointly sold their labor under contract to Nutrition Express. For that labor they jointly received $8,035.00. The Nightengales had a combined basis (cost) of at least $8,035.00 in the labor they sold to Nutrition Express. [TCP, ¶ 6(m); App., Pg. B-16 to B-17]. Neither the money received from the landscaping work, nor from Nutrition for Life/Nutrition Express or Santa Rosa Sales are "Wages" or "Compensation for Services." [TCP, ¶ 6(n); App., Pg. B-17]. The Nightengales were not employees, or engaged in employment or self-employment. They merely sold their labor for the money they received. [TCP, ¶ 6(o); App., Pg. B-17]

Petitioner Glen Nightengale is a Man and Ruby Nightengale is a Woman created by God Almighty. The Nightengales' Life is given to them each day as an endowment (gift) from their Creator. The Nightengales' labor is their property. To the best knowledge of the

Nightengales, the Nightengales' Creator is the original owner and creator of the Nightengales' labor. The Nightengales receive this labor each day as a part of the gift of their life. The Nightengales received this gift after December 31, 1920. The Nightengales have been unable to determine the basis (cost) their Creator had in the labor at the time the labor was given to them. [TCP, ¶ 6(e); App., Pgs. B-14 to B-15].

On February 11, 1994, the Appellee (hereinafter Commissioner) issued a Notice of Deficiency for the years 1988 through 1991. The Notices set forth deficiencies for Glen Nightengale for the year 1988 of $6,209.00; for the year 1989 of $8,536.00; for the year 1990 of $5,738.00; and, for the year 1991 of $5,842.00. The Notices set forth deficiencies for Ruby Nightengale for the year 1988 of $3,085.00; for the year 1989 of $3,066.00; for the year 1990 of $1,631.00; and, for the year 1991 of $1,654.00, plus penalties and interest for both. The Deficiencies were based upon the erroneous presumption that the Petitioner Glen Nightengale had a **ZERO** basis (cost) in the labor he sold in his landscaping work during the years 1988 through 1991 and that both Glen and Ruby Nightengale had a **ZERO** basis (cost) in the labor they sold to Nutrition for Life, Nutrition Express and Santa Rosa Sales during the years 1988 through 1991. Based upon this erroneous conclusion, probably in part on the erroneous 1099's that declared that the Nightengales were paid "Wages" or "Compensation for Services," the Commissioner determined that all of the monies received by the Nightengales for the sale of their labor during the years 1988 through 1991 constituted "Wages" or "Compensation for Services."

On or about July 16, 1994, the Nightengales filed their formal petition in this action. The Nightengales alleged that the Commissioner erred in proceeding as if the Nightengales had a **ZERO** basis (cost) in their labor

[TCP, ¶ 5(d) through (k); App., Pgs. B-13 to B-14]. As they are set forth above, the Petition then set down sufficient facts for the Petitioners' claim that they had a basis (cost) in their labor that was at least equal to the **FAIR MARKET VALUE** of the labor they sold in the landscaping work and to Nutrition for Life, Nutrition Express and Santa Rosa Sales during the years 1988 through 1991.

On August 24, 1994, the Commissioner filed a Motion to Dismiss for Failure to State a Claim upon which Relief could be Granted. The Commissioner argued that the Courts have repeatedly rejected the notion that one can have a basis (cost) in one's own labor. The Commissioner cited 4 cases that had nothing to do with determining whether one had a basis (cost) in one's labor. On August 31, 1994, the Court ordered the Nightengales to respond to the Motion to Dismiss, to file a second amended Petition and set oral argument on the Motions Calendar, in Washington, D.C. on October 5, 1994. On or about September 23, 1994, the Nightengales responded to the Motion to Dismiss and submitted their statement in lieu of appearance. The Court granted the Commissioner's Motion to Dismiss on October 22, 1994. On November 21, 1994, the Nightengales filed their Motion to Vacate or Revise Decision. The Court denied the Motion on December 6, 1994. On March 5, 1995, the Nightengales filed their Notice of Appeal.

On August 22, 1995, the Ninth Circuit affirmed the Tax Court's dismissal. (App., Pgs. B-1 to B-2). The Nightengales filed their Petition for Rehearing on August 11, 1995, which was denied on October 26, 1995. (App., Pgs. B-3). It is the August 22, 1995 decision of the Ninth Circuit Court of Appeals for which Nightengales seek review in this Court by certiorari.

REASONS FOR GRANTING WRIT & ARGUMENT

1. THE APPELLATE COURT'S FINDINGS OF FACT THAT WERE NOT IN THE PLEADINGS WHEN IT AFFIRMED THE TAX COURT'S DISMISSAL ON THE RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS WAS DECIDED IN A WAY THAT CONFLICTS WITH SEVERAL RELEVANT DECISIONS OF THIS COURT. In reviewing a decision of the Tax Court that dismisses a Motion to Dismiss for Failure to State a Claim, the appellate court's review is limited to the Petition and the Court of Appeals, like the trial court, must assume that the facts plead in the Petition are true. In the instant case the Commissioner moved to dismiss each of the Tax Court Petitions on the ground that the Petitions Failed to State a Claim upon which Relief could be Granted. The Tax Court disposed of them, holding that the McNeels "make tax protester-type arguments that have been repeatedly rejected by this Court and others as inapplicable or without merit" (App., Pg. A-8), and that the Nightengales' "argument is nothing more than a variant on the terribly worn argument that amounts received for labor are not income." (App., Pg. B-8)

In affirming the Tax Court, the Ninth Circuit only compounded the problem when it found facts that were never plead and then based upon those facts applied a conclusion of law that is irrelevant to the case at hand. The Ninth Circuit in McNeel made the following findings:

> The McNeels contend that they have a basis in their labor equal to its fair market value and that, in absence of proof by the Commissioner that the **wages** they received exceeded the fair market value of the **services they rendered**, no taxable gain can be ascribed to their receipt of **wages**. [App., Pgs. A-1 to A-2] (emphasis added)

The Ninth Circuit in Nightengale made the following findings:

> The Nightengales contend that the **compensation** they received from their **employers** is not taxable because their basis in the labor is equal to the amount of **compensation** they received. [App., Pgs. B-2] (emphasis added)

The facts that the Ninth Circuit found are emphasized. The Ninth Circuit's findings missed the point and in doing so incorrectly found that the Petitioners had in **fact** received "wages," "rendered services" or were "employees." No claim or allegation in the Tax Court Petition alleged that the money the Petitioners received was "wages" or "compensation" or that the Petitioners "rendered services" as "employees" for an "employer."

The Ninth Circuit could not find these facts unless they were affirmatively plead. The facts were not affirmatively plead and no inference to these facts could be drawn, particularly when you consider that the Nightengales alleged in their Petition that the amounts they received were not "Wages" or "Compensation for Services" and that they were not employees, engaged in employment or self-employment. [TCP, ¶¶ 6(n) and 6(o); App., Pg. B-17]. In light of the limitations imposed upon the Ninth Circuit, it cannot be more clear that the Ninth Circuit exceeded its standard of review and found facts that directly contradicted facts plead in the Petition. Simply put, whether Petitioners received "wages" or were "employees" or "rendered services" are issues of fact, not a question of law.

After, finding these "facts" the Court then proceeded to apply the law that has held that "Wages are includible in gross" income. The Petitioners agree that "wages" are includible in gross income as a matter of law. What must

be determined is not whether "wages" are or are not includible in gross income, but whether any Court in this country can declare as a matter of law that "wages" or "compensation" are received simply because someone works for someone else and sells his labor under contract.

The Commissioner challenged the Petitioners' claim that their labor is their property and is a gift from their Creator at the pleading stage, by her Motion to Dismiss. Because the facts were not challenged in any other way (by way of summary judgment, for example) this court must assume they are true. *Fla. Gen. Contractors v. Jacksonville*, 508 US _____, 124 L.Ed.2d 586, 599, 113 S.Ct. _____, (1993), *citing Lucas v. South Carolina Coastal Council*, 506 US _____, _____, n.3, 120 L.Ed. 798, 810-11, n.3, 112 S.Ct 2886 (1992); *Pennell v. San Jose*, 485 US 1, 7, 99 L.Ed.2d 1, 108 S.Ct 849 (1988). Given that presumption and this Court's standard of review, it was inappropriate for the Ninth Circuit to have affirmed the Tax Court's grant of the Motion to Dismiss and to find facts that were not otherwise plead or that could be inferred from the pleadings.

2. THE NINTH CIRCUIT'S JUDGMENT IGNORED THE PETITIONERS' CLAIM THAT THEIR LABOR, WHICH IS RECEIVED AS A GIFT FROM THEIR CREATOR, IS A GIFT FOR INCOME TAX PURPOSES AND AS SUCH IS A GIFT FOR IRC, § 1015(a), AND THUS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT. FURTHERMORE, BECAUSE THE ISSUE OF WHETHER THERE HAS BEEN A GIFT FOR INCOME TAX PURPOSES IS A QUESTION OF FACT, THE NINTH CIRCUIT HAS DECIDED AN ISSUE OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH SEVERAL APPLICABLE

DECISIONS OF THIS COURT. As the Tax Court Petitions in both McNeel and Nightengale allege, the Petitioners contend that the Respondent erred in proceedings as if the Petitioners had a **ZERO** basis (cost) in the labor that they sold under contract during the years 1986 through 1991 (McNeel) and 1988 through 1991 (Nightengale). The Petitioners alleged that they had a basis (cost) at least equal to, if not greater than, the **FAIR MARKET VALUE** of the labor they sold during these years.

The Respondent asserts the **ZERO** basis (cost) in one's labor as a conclusive, but unsupported presumption. See *Some Constitutional Questions Regarding the Federal Income Tax Laws*, Congressional Research Service Report No. 84-168A, by Howard Zaritsky, Updated by John R. Lucky, Page 11; *Frequently Asked Questions Concerning the Federal Income Tax*, Congressional Research Service Report No. 92-303 A, by John R. Luckey, Page 12.

It has long been recognized that a Man's labor, energies and talents are his property and that this property is a gift from his Creator. *Butcher's Union Co. v. Crescent City Co.*, 111 US 746, 756-57, 28 L.Ed. 585, 4 S.Ct. 652 (1884). Quoting first from the "*Unanimous Declaration of the thirteen united States of America*" (Commonly referred to as the Declaration of Independence) and then from *Adam Smith's, Wealth of Nations*, Book I, Chapter 10 this Court discussed the nature of this "gift."

> "As in our intercourse with our fellow-men, certain principles of morality are **ASSUMED TO EXIST**, without which society would be impossible, so certain **INHERENT RIGHTS** lie at the foundation of all action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily

expressed than in the Declaration of Independence, that new evangel of liberty to the people: "We hold these truths to be self evident" -- this is so plain that their truth is recognized upon their **MERE** statement -- "that all men are **ENDOWED**" -- **NOT** by edicts of Emperors, or decrees of Parliament, or **ACTS OF CONGRESS**, but -- "by their **CREATOR** with certain unalienable rights" -- that is rights which cannot be bartered away, or given away, or taken away, except in punishment of crime -- "and that among these are life, liberty, and the pursuit of happiness, and to secure them" -- not grant but secure them -- "governments are instituted among men, deriving their just powers from the consent of the governed." (*emphasis added*)
Butcher's Union, supra, at 756

"The **PROPERTY** which every man has, in **HIS OWN LABOR** as it is the **ORIGINAL FOUNDATION** of **ALL OTHER PROPERTY**, so it is the most **SACRED** and inviolable." (*emphasis added*). *id.* at 757

Ultimately the basis (cost) the Petitioners have in their labor is determined after establishing whether the gift of this labor is a gift for income tax purposes. No Court has ever addressed whether the gift of Man's labor is a gift for income tax purposes. Whether there has been a gift for income tax purposes requires a "detached and disinterested generosity" on the part of the giver *Commissioner v. Duberstein*, 363 US 278, 285, 4 L.Ed. 1218, 80 S.Ct. 1150 (1960) and is decided as a question of fact *Duberstein*, supra, 289-91. Suffice it to say that the Ninth Circuit's refusal to address the issue leaves no doubt that they intend to proceed as if it is a question of law that can be disposed of in a Motion to Dismiss, in conflict with the applicable decisions of this Court.

Assuming sufficient fact are presented, the Tax Court will have no alternative but to find that the gift of Petitioners' labor is a gift for income tax purposes. However, the presentation of evidence and findings of fact must first be made in the trial Court. On remand to the Ninth Circuit and then to the Tax Court, should it be found that Petitioners' labor, which is indisputably received as a gift from their Creator, **is in fact** a gift for income tax purposes, then the Tax Court would have no alternative but to find that the gift of Petitioners' labor is a gift under provisions of IRC, § 1015(a), which would then control the procedures for determining the basis (cost) the Petitioners have in their labor.

There is nothing in the language of the statute or the legislative history of § 1015(a)[6] to show that Congress excluded from the operation of the statute an intangible gift such as a Man's labor. In light of the principle that the Petitioners are exempt from taxation in the absence of clear and unequivocal language. *Spreckles Sugar Ref. Co. v. McClain*, 192 US 397, 48 L.Ed. 496, 24 S.Ct. 376 (1904), the Petitioners' construction of IRC, § 1015 is more than reasonable.

In determining the amount of "Wages" or "Compensation" that would then be includible in gross income, the following formula would apply. A - C = W

6/ What is now IRC, § 1015(a) was added to the Internal Revenue Laws by the Revenue Act of 1921, P.L. 67-98, Chapter 136, § 202, 42 Stat. 229 in response to donees selling gifts using the market value of a gift at the time the gift was given to the donee instead of using the market value of gift at the time it was acquired by the donor who did not receive it as a gift. Under the previous rule, the recipient of the gift used the market value as of the date of receipt of the gift and by selling it at that price, the end result was no gain. The text of the original enactment from the Revenue Act of 1921 and the comments from Senate Report No. 275 are included in the Appendix Page B-19 and B-20.

A refers to the amount received for the sale of labor
C refers to the cost or basis in the labor[7]
W refers to the amount that would be considered "Wages" or "Compensation for Services" which would then be includible in gross income.

Once the adjusted basis (cost) in the Petitioners' labor is calculated under the applicable provisions of IRC, §§ 1001, 1011, 1012 and 1015 and because the transaction at issue deals with the sale or disposition of property, the Petitioners are entitled to arrange their affairs under the provisions of IRC, § 61(a)(3) "Gains derived from dealings in property." *United States v. Cumberland P.S. Co.*, 338 US 451, 94 L.Ed. 251 70 S.Ct 380 (1950); *Gregory v. Helvering*, 293 US 465, 79 L.Ed. 596, 55 S.Ct. 266 (1935). Furthermore, under the provisions of IRC, § 165(b), the Petitioners are entitled to deduct their basis (cost) in order to determine whether there was a gain or loss from the sale of their labor. *Cottage Savings Association v. Commissioner of Internal Revenue*, 499 US 554, 568, 113 L.Ed.2d 589, 111 S.Ct. 1503 (1991).

Because the Tax Court and the Appellate Court disposed of the Petition and Appeal at the pleading stage and on an incorrect application of the law, the Petitioners were denied the right to arrange their affairs under the law, and present those factors that would establish that the gift of their labor is a gift for income tax purposes and that they have a basis (cost) in their labor. For those reasons, the Petitioners were not permitted to assert those deductions that they were entitled to under the Internal Revenue Laws. As such the Deficiencies demand more than authorized by law.

7/ As discussed above, the Commissioner **always** proceeds on the presumption that the basis (cost) in a Man's labor is **ZERO**.

CONCLUSION

It is patently clear, that the Appellate Court's judgment found facts that were not present or which could be inferred from the pleadings. It is also equally clear that the Appellate Court's judgment ignored essential issues to the resolution of this action. In both instances, the Appellate Court's judgment was made in a way that conflicts with several relevant decisions of this Court.

Accordingly, and for the forgoing reasons, this Court should issue the Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 23rd day of January, 1996.

NOEL D. McNEEL
c/o P.O. Box 2
CHANDLER, ARIZONA 85244
(602) 671-6299

JOYCE A. McNEEL

GLEN NIGHTENGALE
c/o 10437 WEST RUTH AVENUE
PEORIA, ARIZONA 85345
(602) 972-3431
PETITIONERS, IN PRO PER

RUBY NIGHTENGALE

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APPENDIX A
McNEEL

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED JULY 3, 1995

NOEL D. McNEEL, JOYCE A. McNEEL	)	No. 94-70887
Petitioners-Appellants,	)	IRS No. 25907-93
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	Memorandum*
Respondent-Appellee.	)	

Appeal from the United States Tax Court
Submitted June 26, 1995**

Before: O'SCANNLAIN, LEAVY, and HAWKINS, Circuit Judges.

Noel and Joyce McNeel appeal pro se the tax court's dismissal of their petition challenging the determination by the Commissioner of Internal Revenue that they each owed income taxes and additions to tax for 1986 through 1991. The McNeels contend that they have a basis in

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

their labor equal to its fair market value and that, in absence of proof by the Commissioner that the wages they received exceeded the fair market value of the services they rendered, no taxable gain can be ascribed to their receipt of wages. The tax court properly rejected this argument. See United States v. Buras, 633 F.2d 1356, 1361 (9th Cir., 1980) (rejecting argument that "since the wage earner exchanges his labor and personal time for its equivalent in money, he derives no gain and therefore cannot be taxed"). Since the McNeels' motion to vacate the tax court's decision was founded on the same argument, the tax court did not abuse its discretion in denying their motion. See Thomas v. Lewis 945 F.2d 1119, 1123 (9th Cir., 1991)

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED OCTOBER 26, 1995

NOEL D. McNEEL, JOYCE A. McNEEL	)	No. 94-70887
Petitioners-Appellants,	)	IRS No. 25907-93
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	ORDER
Respondent-Appellee.	)	

Before: O'SCANNLAIN, LEAVY, and HAWKINS, Circuit Judges.

The petition for rehearing is denied.

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UNITED STATES TAX COURT
Washington, D.C. 20217

NOEL D. McNEEL, JOYCE A. McNEEL	)	
Petitioners	)	
v.	)	
	)	Docket No. 25907-93
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
Respondent	)	

ORDER AND DECISION

Pursuant to the opinion of this Court as set forth in the pages of the transcript of the proceedings before Special Trial Judge John J. Pajak at Phoenix, Arizona, on June 2, 1994, containing his oral findings of fact and opinion, it is

ORDERED that respondent's Motion to dismiss for Failure to State a Claim, filed March 21, 1994, is granted. It is further

ORDERED and DECIDED as to petitioner Noel D. McNeel that there are deficiencies in income tax due from petitioner for the taxable years 1986, 1987, 1988, 1989, 1990 and 1991, in the amounts of $1,235, $321, $521, $1,241, $626, and $781, respectively; and that there are additions to tax due from petitioner for the taxable years 1986, 1987, 1988, 1989, 1990 and 1991, under I.R.C. section 6651(a)(1) in the amounts of $207, $100, $100, $137, $82, and $100, respectively; and that there

are additions to tax due from petitioner for the taxable years 1986, 1988, 1989, 1990 and 1991, under I.R.C. section 6654 in the amounts of $57, $32, $84, $42, and $45, respectively. It is further

ORDERED and DECIDED as to petitioner Joyce A. McNeel that there are deficiencies in income tax due from petitioner for the taxable years 1986, 1987, 1988, 1989, 1990 and 1991, in the amounts of $1,235, $321, $521, $1,241, $626, and $686, respectively; and that there are additions to tax due from petitioner for the taxable years 1986, 1987, 1988, 1989, 1990 and 1991, under I.R.C. section 6651(a)(1) in the amounts of $207, $100, $100, $137, $81, and $100, respectively; and that there are additions to tax due from petitioner for the taxable years 1986, 1988, 1989, 1990 and 1991, under I.R.C. section 6654 in the amounts of $57, $32, $84, $42, and $38, respectively. It is further

ORDERED and DECIDED that respondent's Oral Motion For A Penalty under section 6673, is granted. It is further

ORDERED and DECIDED that a penalty is due from the petitioners which is hereby awarded to the United States in the amount of $7,500 pursuant to I.R.C. section 6673(a)(1).

John J. Pajak
Special Trial Judge

Entered: July 29, 1994

Bench Opinion by Special Trial Judge John J. Pajak
Docket No. 25907-93 June 2, 1994

THE COURT: The Court has decided to render oral findings of fact and opinion in the case, and the following represents the Court's oral findings of fact and opinion.

Noel D. McNeel, pro se.

Susan T. Mathew, for respondent.

In this bench opinion all section numbers refer to the Internal Revenue Code in effect for the taxable years in issue. All rule numbers refer to the Tax Court rules of practice and procedure.

Respondent determined deficiencies and additions to petitioners' federal income tax as follows: Separate notices were sent to Noel D. McNeel and Joyce A. McNeel. With respect to Noel D. McNeel, the years are as follows: 1986, 1987, 1988, 1989, 1990 and 1991. The deficiencies are: $1,235, $321, $521, $1,241, $626, $781. The additions to tax, Section 6651(a)(1), $207, $100, $100, $137, $82, $100. Under Section 6654: $57, none, $32, $84, $42, $45, all respectively.

For Joyce A. McNeel, the years are as follows: 1986, 1987, 1988, 1989, 1990 and 1991. Deficiencies: $1,235, $321, $521, $1,241, $626, $686. Additions to tax, Section 6651(a)(1): $207, $100, $100, $137, $81, $100. Under Section 6654: $57, blank, $32, $84, $42, $38.

Respondent's determinations are based on the failure of petitioners to report income. Let's go off the record for a moment.

(Off the record)

THE COURT: This case is before the Court on the respondent's motion to dismiss for failure to state a claim upon which relief can be granted, filed pursuant to Rule 40, and respondent's oral motion for a penalty under Section 6673.

Petitioner filed a response to respondent's motion. Petitioner also filed a motion for summary judgment, which was denied. Petitioners failed to comply with the court's March 23, 1994, order that the file a second amended petition by a set date.

Petitioners contend that the they sold their labor but they're so-called cost basis was equal to the dollars received, thus they claim they owe no tax. The short answer to petitioners' assertions are that they are not exempt from federal income tax, Abrams vs. Commissioner, 82 T.C. 403, 406-407 (1984).

In their petition and motion for summary judgment and the response to respondent's motion, petitioners make tax protestor arguments that have been repeatedly rejected by this Court and others as inapplicable or without merit. See, for example, Rowlee vs. Commissioner, 80 T.C. 1111 (1983); McCoy vs. Commissioner, 76 T.C. 1027 (1981), affirmed 696 F.2d 1234, (Ninth Circuit, 1983). We see no need to repeat these discussions.

Rule 34(b)(4) and (5) provides in pertinent part the petition in a deficiency action shall contain, "Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency or liability," and, "Clear and concise lettered statements of facts on which petitioner bases the assignment of error."

We agree with respondent that petitioners' petition does not allege any justiciable error with respect to respondent's determinations in the notices of deficiency, and alleges no justiciable facts in support of any error as required by Rule 34(b)(4) and (5). Accordingly, decision will be entered for respondent.

We next consider respondent's motion for a penalty under Section 6673. Section 6673(a)(1) provides that, "Whenever it appears to the Tax Court that..(a)

proceedings before it have been instituted or maintained by the taxpayer primarily for delay; (b) the taxpayer's position in such proceeding is frivolous or groundless, or (c) the taxpayer unreasonably failed to pursue available administrative remedies, the Tax Court, in its decision, may require the taxpayer to pay to the United State a penalty not in excess of $25,000.

We find that the petitioners have instituted and maintained this action primarily for delay and that petitioner's position in this proceeding is frivolous and groundless, accordingly, we will grant respondent's oral motion for a penalty, and in or decision we will require petitioners to pay to the United States a penalty of $7,500.00.

An appropriate order and decision will be entered.

This concludes the Court's oral findings of fact and opinion in this case.

(Whereupon, at 12:22 p.m., the hearing in the above entitled matter was adjourned.)

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NOEL D. McNEEL
JOYCE A. McNEEL
c/o P.O. Box 2
Chandler, Arizona 85244

Petitioners, In Pro Per

UNITED STATES TAX COURT

NOEL D. McNEEL JOYCE A. McNEEL Petitioners v. COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent.	)	Docket No. 25907-93 **PETITION**

The Petitioners, Noel D. and Joyce A. McNeel, hereby petition for dismissal of the Notices of Deficiency issued by the Commissioner of Internal Revenue for the years 1986 through 1991 for both Petitioners and as a basis for their Case allege and aver as follows:

1. The Petitioners can be found in Maricopa County, Arizona by using P.O. Box 2, Chandler, Arizona 85244.
2. The Notices of Deficiency, copies of which is attached as Exhibits A through D, including all statements of the Commissioner attached thereto, were mailed to the Petitioners on or about August 26, 1993. The Notices were purportedly issued by Mark D. Fox, District, Director in Phoenix, Arizona.

3. The Deficiency in taxes determined for Noel D. McNeel for the year 1986 is $1,235.00; for the year 1987 is $321.00; for the year 1988 is $521.00; for the year 1989 is $1,241.00; for the year 1990 is $626.00; and, for the year 1991 is $781.00. The Deficiency in taxes determined for Joyce A. McNeel for the year 1986 is $1,235.00; for the year 1987 is $321.00; for the year 1988 is $521.00; for the year 1989 is $1,241.00; for the year 1990 is $626.00; and, for the year 1991 is $686.00.

4. Penalties per section are set forth below:

NOEL D. McNEEL

Year	§ 6651(a)(1)	§ 6654
1986	$ 207.00	$ 57.00
1987	$ 100.00	N/A
1988	$ 100.00	$ 32.00
1989	$ 137.00	$ 82.00
1990	$ 82.00	$ 42.00
1991	$ 100.00	$ 45.00

JOYCE A. McNEEL

Year	§ 6651(a)(1)	§ 6654
1986	$ 207.00	$ 57.00
1987	$ 100.00	N/A
1988	$ 100.00	$ 32.00
1989	$ 137.00	$ 84.00
1990	$ 81.00	$ 42.00
1991	$ 100.00	$ 38.00

5. The determination of tax set forth in said Notices of Deficiency is based upon the following errors:
   (a). Error in proceeding as if the Petitioners are filing married filing separately.
   (b). Error in proceeding as if the income, if there

was any, was attributable to the Petitioners as income of **individual** "citizens or residents of the United States."

(c). Error in proceeding as if the Petitioners' income, if there was any, was derived from sources within the United States.

(d). Error in issuing the Notice of Deficiency without establishing the basis for or making the determination of the existence of the deficiency.

(e). Error in proceeding as if the Petitioner Noel D. McNeel had a "zero" basis (cost) in the labor he sold each day to various Companies for construction work during the year 1986.

(f). Error in proceeding as if the Petitioner Noel D. McNeel had a "zero" basis (cost) in the labor he sold each day to various Companies for construction work during the year 1987.

(g). Error in proceeding as if the Petitioner Noel D. McNeel had a "zero" basis (cost) in the labor he sold each day to various Companies for construction work during the year 1988.

(h). Error in proceeding as if the Petitioner Noel D. McNeel had a "zero" basis (cost) in the labor he sold each day to various Companies for construction work during the year 1989.

(i). Error in proceeding as if the Petitioner Noel D. McNeel had a "zero" basis (cost) in the labor he sold each day to various Companies for construction work during the year 1990.

(j). Error in proceeding as if the Petitioner Noel D. McNeel had a "zero" basis (cost) in the labor he sold each day to various Companies for construction work during the year 1991.

(k). Error in proceeding as if the Petition Joyce A. McNeel had a "zero" basis (cost) in the labor

she sold each day to Burger King during the year 1986.

(l). Error in proceeding as if the Petition Joyce A. McNeel had a "zero" basis (cost) in the labor she sold each day to Luby's Cafeterias, Inc. during the year 1988.

(m). Error in proceeding as if the Petition Joyce A. McNeel had a "zero" basis (cost) in the labor she sold each day to Luby's Cafeterias, Inc. during the year 1989.

(n). Error in proceeding as if the Petition Joyce A. McNeel had a "zero" basis (cost) in the labor she sold each day to Luby's Cafeterias, Inc. during the year 1990.

(o). Error in proceeding as if the Petition Joyce A. McNeel had a "zero" basis (cost) in the labor she sold each day to Luby's Cafeterias, Inc. during the year 1991.

6. The facts upon which the Petitioners rely, as the basis for their case, are as follows:

(a). During the years 1986 through 1991 the Petitioners were non-resident aliens. Though being found in Arizona they did not established residence at any time. They have not applied for permanent residence "within the United States" ("**green card**" test), nor were they resident "within the United States" under the substantive presence test.

(b). During the years 1986 through and 1990, the Petitioners did not receive any dividends, rents, royalties, interest or other fixed or determinable, annual or periodical income "within the United States", as defined in the Internal Revenue Code (IRC), §871(a) and the regulations promulgated thereunder.

(c). During the years 1986 through 1991, the

Petitioners did not receive any income "within the United States" or any income without the United States that was effectively connected with the conduct of a trade or business "within the United States."

(d). During the years 1986 through 1991, the Petitioner did not make an election under IRC, §871(d).

(e). The labor of both Petitioners is their property. As a part of their life they receive their labor as a day to day gift from their Creator. The property was received by the Petitioners after December 31, 1920. The Petitioners' Creator is the original owner of this property and the Petitioners' Creator did not receive the property as a gift before giving it to the Petitioners. The Petitioners have been unable to discover the basis (cost) the Petitioners' Creator had in the labor at the time it was given to the Petitioners as a gift. The Secretary has either failed to determine the basis (cost) in the Petitioners' labor as required by Internal Revenue Code (IRC), § 1015(a) or has been unable to determine the basis (cost) that the Petitioners' Creator had in the gift of the labor was given to the Petitioners. If the Secretary is unable to determine the basis (cost) of the Petitioners' labor that was received as a gift, the Secretary must proceed as if the basis (cost) is the "**FAIR MARKET VALUE**" of the property based upon the best information available to him. The only information that would be available to the Secretary to determine the basis (cost) the Petitioners had in their labor would be the amount they received each day

they sold their labor.

(f). During the year 1986, Petitioner Noel D. McNeel sold his labor to various companies and provided Construction work. For that labor he received $18,444.00. Petitioner had a basis (cost) of $18,444.00 in the labor he sold to the various Companies for the construction work.

(g). During the year 1987, Petitioner Noel D. McNeel sold his labor to various companies and provided Construction work. For that labor he received $12,620.00. Petitioner had a basis (cost) of $12,620.00 in the labor he sold to the various Companies for the construction work.

(h). During the year 1988, Petitioner Noel D. McNeel sold his labor to various companies and provided Construction work. For that labor he received $6,239.00. Petitioner had a basis (cost) of $6,239.00 in the labor he sold to the various Companies for the construction work.

(i). During the year 1989, Petitioner Noel D. McNeel sold his labor to various companies and provided Construction work. For that labor he received $17,824.00. Petitioner had a basis (cost) of $17,824.00 in the labor he sold to the various Companies for the construction work.

(j). During the year 1990, Petitioner Noel D. McNeel sold his labor to various companies and provided Construction work. For that labor he received $7,932.00. Petitioner had a basis (cost) of $7,932.00 in the labor he sold to the various Companies for the construction work.

(k). During the year 1991, Petitioner Noel D. McNeel sold his labor to various companies and provided Construction work. For that labor he received $8,507.00. Petitioner had a basis (cost) of $8,507.00 in the labor he sold to the various Companies for the construction work.

(l). During the year 1986, Petitioner Joyce A. McNeel sold her labor to Burger King. For that labor she received $2,803.00. Petitioner had a basis (cost) of $2,803.00 in the labor she sold to Burger King.

(m). During the year 1988, Petitioner Joyce A. McNeel sold her labor to Luby's Cafeterias, Inc. For that labor she received $9,643.00. Petitioner had a basis (cost) of $9,643.00 in the labor she sold to Luby's Cafeterias, Inc.

(n). During the year 1989, Petitioner Joyce A. McNeel sold her labor to Luby's Cafeterias, Inc. For that labor she received $7,906.00. Petitioner had a basis (cost) of $7,906.00 in the labor she sold to Luby's Cafeterias, Inc.

(o). During the year 1990, Petitioner Joyce A. McNeel sold her labor to Luby's Cafeterias, Inc. For that labor she received $9,954.00. Petitioner had a basis (cost) of $9,954.00 in the labor she sold to Luby's Cafeterias, Inc.

(p). During the year 1991, Petitioner Joyce A. McNeel sold her labor to Luby's Cafeterias, Inc. For that labor she received $9,890.00. Petitioner had a basis (cost) of $9,890.00 in the labor she sold to Luby's Cafeterias, Inc.

RELIEF SOUGHT

WHEREFORE, the Petitioners respectfully request and lawfully demand that this Court:

A. Dismiss the Commissioner's Notice of Deficiency; and,

B. Declare that the Petitioners are non-resident aliens under the internal revenue laws; or in the alternative,

C. Declare that IRC, §1015(a) would generally establish a presumption that a Man or Woman has a "**FAIR MARKET VALUE**" basis (cost) in his or her labor.

D. Declare that the Respondent has the burden of proof of showing that the Petitioners have a basis (cost) other than a "**FAIR MARKET VALUE**" basis (cost) in their labor; and,

E. Declare that the Petitioners have a "**FAIR MARKET VALUE**" basis (cost) in their labor; and,

F. Issue a written memorandum decision declaring that there was no Deficiency in income taxes; and,

G. Grant such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this _____ day of February, 1994.

NOEL D. McNEEL
c/o P.O. Box 2
Chandler, Arizona 85244
Petitioners, In Pro Per

JOYCE A. McNEEL

APPENDIX B
NIGHTENGALE

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED AUGUST 22, 1995

GLEN NIGHTENGALE, RUBY NIGHTENGALE	)	No. 95-70239
Petitioners-Appellants,	)	IRS No. 8129-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	Memorandum*
Respondent-Appellee.	)	

Appeal from the United States Tax Court

Submitted August 16, 1995**

Before: ALARCON, FERNANDEZ, and RYMER, Circuit Judges.

Glen and Ruby Nightengale appeal pro se the tax court's dismissal for failure to state a claim of their petition for redetermination of federal income tax deficiencies for tax years 1988 through 1991. The also appeal the denial of their motion to vacate the tax court's

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

decision. We have jurisdiction pursuant to 26 U.S.C. § 7482, and we affirm.

The Nightengales contend that the compensation they received from their employers is not taxable because their basis in the labor is equal to the amount of compensation they received. The tax court properly rejected this frivolous contention. See Carter v. Commissioner, 784 F.2d 1006, 1009 (9th Cir., 1986); Olson v. United States, 760 F.2d 1003, 1005 (9th Cir., 1985)

Because we agree with the tax court that the Nightengales' petition was frivolous, we affirm the tax court's imposition of a penalty pursuant to 26 U.S.C. § 6673. See Larsen v. Commissioner, 765 F.2d 939, 941 (9th Cir., 1985) (per curiam)

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED OCTOBER 26, 1995

GLEN NIGHTENGALE, RUBY NIGHTENGALE	)	No. 95-70239
Petitioner-Appellant,	)	IRS No. 8129-94
v.	)	
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	ORDER
Respondent-Appellee.	)	

Before: ALARCON, FERNANDEZ, and RYMER, Circuit Judges.

The petition for rehearing is denied.

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UNITED STATES TAX COURT
Washington, D.C. 20217

GLEN NIGHTENGALE RUBY NIGHTENGALE	)	
Petitioner	)	
v.	)	
	)	Docket No. 8129-94
COMMISSIONER OF INTERNAL REVENUE SERVICE,	)	
Respondent	)	

ORDER OF DISMISSAL AND DECISION

This case is before the Court on respondent's motion dismiss for failure to state a claim upon which relief can be granted filed pursuant to Rule 40.[1] Petitioners resided in Peoria, Arizona, at the time they filed their petition.

On February 11, 1994, respondent issued to Petitioners separate notices of deficiency in which she determined the following deficiencies and additions to tax:

[1] All section references are to the Internal Revenue Code in effect for the years in issue. All Rule references are to the Tax Court Rules of Practice and Procedure.

Additions to tax

Glen Nightengale

Year	Deficiency	Additions to Tax, I.R.C. § 6651(a)	§ 6654(a)
1988	$ 6,209	$ 1,552	$ 398
1989	8,536	2,134	576
1990	5,738	1,432	377
1991	5,842	1,461	333

Ruby Nightengale

Year	Deficiency	§ 6651(a)	§ 6654(a)
1988	$ 3,085	$ 771	$ 197
1989	3,066	767	210
1990	1,631	408	106
1991	1,654	414	92

The gravamen of petitioners' argument is that they exchanged their labor for pay and

> The labor of both Petitioners is their property. As a part of their life they receive their labor as a day to day gift from their Creator. * * * The Petitioners have been unable to discover the basis (cost) the Petitioners' Creator had in the labor at the time it was given to the Petitioners as a gift. The Secretary has either failed to determine the basis (cost) in the Petitioners' labor as required by Internal Revenue Code (IRC), § 1015(a) or has been unable to determine the basis (cost) that the Petitioners' Creator had in the gift of the labor [that] was given to the Petitioners. If the Secretary is unable to determine the basis (cost) of the Petitioners' labor that was received as a gift, the Secretary must proceed as if the basis (cost) is the "**FAIR MARKET VALUE**" of the property based upon the best

information available to him. The only information that would be available to the Secretary to determine the basis (cost) the Petitioners had in their labor would be the amount they received each day they sold their labor.

On August 29, 1994, respondent filed a motion to dismiss for failure to state a claim under Rule 40. by an Order, dated August 31, 1994, this Court directed petitioners to file an amended petition, stating specific allegations of error in the notice of deficiency and a separate statement of facts, on or before September 23, 1994. In addition, this Court set a hearing for respondent's motion on October 5, 1994. Petitioners did not file an amendment to their petition and did not appear at the hearing. In their statement in lieu of appearance, petitioners stated that "The only issue that this Court must decide is whether the Petitioners assertions that he [sic] has a basis (cost) in his [sic] labor that is to the **FAIR MARKET VALUE** of his [sic] labor."

Respondent asserts that this case should be dismissed for failure to state a claim because petitioners failed to allege in the petition any justiciable error, and merely assert frivolous protester type arguments.

Under Rule 34(b)(4) and (5), a petition must contain "Clear and concise assignments of each and every error which the petitioner alleges to have been committed by the Commissioner in the determination of the deficiency * * *" and "Clear and concise lettered statement of facts on which petitioner bases the assignments of error * * *." Moreover, any issue not raised in the assignment of errors shall be deemed conceded. Rule 34(b)(4); Jarvis v. Commissioner, 78 T.C. 658 (1982).

Rule 40 provides that a party may file a motion to dismiss for failure to state a claim upon which relief can

be granted. We may dismiss a petition when it appears beyond doubt that the taxpayer can prove no set of facts to support his claim that would entitle him to relief.

Despite statements to the contrary, petitioners' argument is nothing more than a variant on the terribly worn argument that amounts received for labor are not income. We have addressed this argument and other variants thereof time and time again. E.g. Abrams v. Commissioner 82 T.C. 403, 407 (1984); Rice v. Commissioner, T.C. Memo 1982-129. Rather than restating our prior opinions, we repeat the words of the Fifth Circuit in Crain v. Commissioner, 737 F.2d 1417 (5th Cir., 1984): "We perceive no need to refute these arguments with somber reasoning and copious citation of precedent; to do so might suggest that arguments have some colorable merit."

Because petitioners failed to assert any specific assignments of error relating to respondent's determinations, all issues raised in the notices of deficiency are deemed conceded. As such, petitioners have failed to state a claim upon which relief can be granted. Respondent's motion to dismiss will be granted.

The final matter we consider is whether we should award a penalty to the United States under section 6673. Section 6673(a), as amended by the Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, sec. 7731(a), 103 Stat. 2106, 2400, provides in pertinent part:

> (1) Procedures instituted primarily for delay, etc.-- Whenever it appears to the Tax Court that --
>
> (A) proceedings before it have been instituted or maintained by the taxpayer primarily for delay,
>
> (B) the taxpayer's position in such

proceeding is frivolous or groundless, or

the Tax Court, in its decision, may require the taxpayer to pay to the United States a penalty not in excess of $25,000.00.

A petition to the Tax Court is frivolous if it is contrary to established law and unsupported by a reasoned, colorable argument for change in the law. Coleman v. Commissioner, 791 F.2d 68, 71 (7th Cir., 1986). That is precisely what petitioners have presented to this Court. Based upon the established law, petitioners' arguments are groundless. Petitioners with genuine controversies were delayed while we considered this nonsense. Accordingly, we will require each petitioner to pay a penalty to the United States in the amount of $2,500. Coulter v. Commissioner, 82 T.C. 580 (1984); Abrams v. Commissioner, supra.

To reflect the foregoing, it is

ORDERED that respondent's Motion to Dismiss for Failure to State a Claim upon which Relief Can Be Granted, filed August 29, 1994, is granted and this case is dismissed for failure to state a claim upon which relief can be granted. Rule 40. It is further

ORDERED AND DECIDED that there are deficiencies and additions to tax due from petitioners as follows:

Glen Nightengale

		Additions to Tax, I.R.C.	
Year	Deficiency	§ 6651(a)	§ 6654(a)
1988	$ 6,209	$ 1,552	$ 398
1989	8,536	2,134	576
1990	5,738	1,432	377
1991	5,842	1,461	333

Ruby Nightengale

Year	Deficiency	§ 6651(a)	§ 6654(a)
1988	$ 3,085	$ 771	$ 197
1989	3,066	767	210
1990	1,631	408	106
1991	1,654	414	92

It is further

ORDERED AND DECIDED that each petitioner shall pay a penalty to the United States in the amount of $2,500 pursuant to section 6673, I.R.C.

L.W. Hamblen, Jr.
Chief Judge

Entered: Oct 20 1994

GLEN NIGHTENGALE
RUBY NIGHTENGALE
c/o 10437 West Ruth Avenue
Peoria, Arizona 85345

Petitioners, In Pro Per

UNITED STATES TAX COURT

GLEN NIGHTENGALE RUBY NIGHTENGALE Petitioners v. COMMISSIONER OF INTERNAL REVENUE SERVICE, Respondent.	)	Docket No. 8129-94. **PETITION**

The Petitioners, Glen Nightengale and Ruby Nightengale, hereby petition for dismissal of the Notices of Deficiency issued by the Commissioner of Internal Revenue for the years 1989 through 1991 for both Petitioners and as a basis for their Case allege and aver as follows:

1. The Petitioners can be found in Maricopa County, Arizona at 10437 West Ruth Avenue, Peoria, Arizona 85345.
2. The Notices of Deficiency, copies of which is attached as Exhibits A through D, including all statements of the Commissioner attached thereto, were mailed to the Petitioners on or about February 11, 1994. The Notices were purportedly issued by Mark D. Cox, District Director in Phoenix, Arizona.

3. The Deficiency in taxes determined for Glen Nightengale for the year 1988 is $6,209.00; for the year 1989 is $8,536.00; for the year 1990 is $5,738.00; and, for the year 1991 is $5,842.00. The Deficiency in taxes determined for Ruby Nightengale for the year 1988 is $3,085.00; for the year 1989 is $3,066.00; for the year 1990 is $1,631.00; and, for the year 1991 is $1,654.00.

4. Penalties per section are set forth below:

GLEN NIGHTENGALE

Year	§ 6651(a)(1)	§ 6654
1988	$ 1,552.00	$ 398.00
1989	$ 2,134.00	$ 576.00
1990	$ 1,432.00	$ 377.00
1991	$ 1,461.00	$ 333.00

RUBY NIGHTENGALE

Year	§ 6651(a)(1)	§ 6654
1988	$ 771.00	$ 197.00
1989	$ 767.00	$ 210.00
1990	$ 408.00	$ 106.00
1991	$ 414.00	$ 92.00

5. The determination of tax set forth in said Notices of Deficiency is based upon the following errors:

   (a). Error in proceeding as if the income, if there was any, was attributable to the Petitioners as income of **individual** "citizens or residents of the United States."

   (b). Error in proceeding as if the Petitioners' income, if there was any, was derived from sources within the United States.

   (c). Error in issuing the Notice of Deficiency without establishing the basis for or making

the determination of the existence of the deficiency.

(d). Error in proceeding as if the Petitioner Glen Nightengale had a "zero" basis (cost) in the labor he sold under contract each day for his landscaping work during the year 1988.

(e). Error in proceeding as if the Petitioner Glen Nightengale had a "zero" basis (cost) in the labor he sold under contract for his landscaping work during the year 1989.

(f). Error in proceeding as if the Petitioner Glen Nightengale had a "zero" basis (cost) in the labor he sold under contract each day for his landscaping work during the year 1990.

(g). Error in proceeding as if the Petitioner Glen Nightengale had a "zero" basis (cost) in the labor he sold under contract each day for his landscaping work during the year 1991.

(h). Error in proceeding as if the Petitioners Glen and Ruby Nightengale had a "zero" basis (cost) in the labor they sold under contract each day they worked for Nutrition for Life during the year 1988.

(i). Error in proceeding as if the Petitioners Glen and Ruby Nightengale had a "zero" basis (cost) in the labor they sold under contract each day they worked for Nutrition Express and Santa Rosa Sales during the year 1989.

(j). Error in proceeding as if the Petitioners Glen and Ruby Nightengale had a "zero" basis (cost) in the labor they sold under contract each day they worked for Nutrition Express during the year 1990.

(k). Error in proceeding as if the Petitioners Glen and Ruby Nightengale had a "zero" basis (cost) in the labor they sold under contract each day

they worked for Nutrition Express during the year 1991.

6. The facts upon which the Petitioners rely, as the basis for their case, are as follows:

(a). During the years 1988 through 1991 the Petitioners were non-resident aliens. Though being found in Arizona they did not established residence at any time. They have not applied for permanent residence "within the United States" ("**green card**" test), nor were they resident "within the United States" under the substantive presence test.

(b). During the years 1988 through and 1991, the Petitioners did not receive any dividends, rents, royalties, interest or other fixed or determinable, annual or periodical income "within the United States", as defined in the Internal Revenue Code (IRC), §871(a) and the regulations promulgated thereunder.

(c). During the years 1988 through 1991, the Petitioners did not receive any income "within the United States" or any income without the United States that was effectively connected with the conduct of a trade or business "within the United States."

(d). During the years 1988 through 1991, the Petitioners did not make an election under IRC, §871(d).

(e). The labor of both Petitioners is their property. As a part of their life they receive their labor as a day to day gift from their Creator. The property was received by the Petitioners after December 31, 1920. The Petitioners' Creator is the original owner of this property and the Petitioners' Creator did not receive the property as a gift before giving it to the

Petitioners. The Petitioners have been unable to discover the basis (cost) the Petitioners' Creator had in the labor at the time it was given to the Petitioners as a gift. The Secretary has either failed to determine the basis (cost) in the Petitioners' labor as required by Internal Revenue Code (IRC), § 1015(a) or has been unable to determine the basis (cost) that the Petitioners' Creator had in the gift of the labor was given to the Petitioners. If the Secretary is unable to determine the basis (cost) of the Petitioners' labor that was received as a gift, the Secretary must proceed as if the basis (cost) is the "**FAIR MARKET VALUE**" of the property based upon the best information available to him. The only information that would be available to the Secretary to determine the basis (cost) the Petitioners had in their labor would be the amount they received each day they sold their labor.

(f). During the year 1988, Petitioner Glen Nightengale sold his labor under contract while doing his landscaping work. For that labor he received $23,115.00. Petitioner had a basis (cost) of at least $23,115.00 in the labor he sold while doing his landscaping work.

(g). During the year 1989, Petitioner Glen Nightengale sold his labor under contract while doing his landscaping work. For that labor he received $23,200.00. Petitioner had a basis (cost) of at least $23,200.00 in the labor he sold while doing his landscaping work.

(h). During the year 1990, Petitioner Glen Nightengale sold his labor under contract while doing his landscaping work. For that labor he received $23,165.00. Petitioner had a

basis (cost) of at least $23,165.00 in the labor he sold while doing his landscaping work.

(i). During the year 1991, Petitioner Glen Nightengale sold his labor under contract while doing his landscaping work. For that labor he received $24,000.00. Petitioner had a basis (cost) of at least $24,000.00 in the labor he sold while doing his landscaping work.

(j). During the year 1988, Petitioners Glen and Ruby Nightengale jointly sold their labor under contract to Nutrition for Life. For that labor they jointly received $6,956.00. The Petitioners had a combined basis (cost) of at least $6,956.00 in the labor they sold to Nutrition for Life.

(k). During the year 1989, Petitioners Glen and Ruby Nightengale jointly sold their labor under contract to Nutrition Express and Santa Rosa Sales. For the labor they sold to Nutrition Express they jointly received $19,694.00. The Petitioners had a combined basis (cost) of at least $19,694.00 in the labor they sold to Nutrition Express. For the labor they sold to Santa Rosa Sales they received $880.00. The Petitioners had a combined basis (cost) of at least $880.00 in the labor they sold to Santa Rosa Sales.

(l). During the year 1990, Petitioners Glen and Ruby Nightengale jointly sold their labor under contract to Nutrition Express. For that labor they jointly received $8,165.00. The Petitioners had a combined basis (cost) of at least $8,165.00 in the labor they sold to Nutrition Express.

(m). During the year 1991, Petitioners Glen and Ruby Nightengale jointly sold their labor

under contract to Nutrition Express. For that labor they jointly received $8,035.00. The Petitioners had a combined basis (cost) of at least $8,035.00 in the labor they sold to Nutrition Express.

(n). The money received from the landscaping work, or from Nutrition for Life/Nutrition Express or Santa Rosa Sales are "Wages" or "Compensation for Services."

(o). The Petitioners were not employees, or engaged in employment or self-employment. They merely sold their labor for the money they received.

RELIEF SOUGHT

WHEREFORE, the Petitioners respectfully request and lawfully demand that this Court:

A. Dismiss the Commissioner's Notice of Deficiency; and,

B. Declare that the Petitioners are non-resident aliens under the internal revenue laws; or in the alternative,

C. Declare that IRC. §1015(a) would generally establish a presumption that a Man or Woman has basis (cost) in his or her labor that is equal to the **FAIR MARKET VALUE** of his or her labor.

D. Declare that the Respondent has the burden of proof of showing that the Petitioners have a basis (cost) in their labor other than the **FAIR MARKET VALUE** of their labor; and,

E. Declare that the Petitioners have a basis (cost) in their labor that is at least equal to the **FAIR MARKET VALUE** of their labor; and,

F. Issue a written memorandum decision declaring that there was no Deficiency in income taxes; and,

G. Grant such other and further relief as the Court deems just and proper.

RESPECTFULLY SUBMITTED this _____ day of February, 1994.

_____	_____
GLEN NIGHTENGALE	RUBY NIGHTENGALE
c/o 10437 West Ruth Avenue	
Peoria, Arizona 85345	
Petitioners, In Pro Per	

TEXT OF P.L. 67-98, CHAPTER 136, § 202(a)(2) 42 STAT 229

SEC. 202. (a) That the basis for ascertaining the gain derived or loss sustained from a sale or other disposition of property, real, personal or mixed, acquired after February 28, 1913, shall be the cost of such property; except that--

* * *

(2) In the case of such property, acquired by gift after December 31, 1920, the basis shall be the same as that which it would have in the hands of the donor or last preceding owner by whom it was not acquired by gift. If the facts necessary to determine such basis are unknown to the donee, the Commissioner shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the Commissioner finds it impossible to obtain such facts, the basis shall be the value of such property as found by the Commissioner as of the date or approximate date at which, according to the best information the Commissioner is able to obtain, such property was acquired by such donor or last preceding owner. In the case of such property acquired by gift on or before December 31, 1920, the basis for ascertaining gain or loss from a sole or other disposition thereof shall be the faire market price or value of such property at the time of such acquisition.

TEXT OF COMMENT ON § 202(a)(2) OF REVENUE ACT OF 1921 FROM SENATE REPORT 275, PAGE 10-11

An essential change, however, is made in the case of property acquired by gift. No explicit rule is found in the present statute for determining gain or loss resulting from the sale of such proper, but the Treasury Department has held that the proper basis for such

determination is the fair market price or value of such at the time of its acquisition by the donee. This rule has been the source of serious abuse. Taxpayers who have property the value of which has increased, give such property to wives or relatives, by whom it may be sold without taxation of the increase in value which took place with the property was owned by the Donor. The proposed bill, in paragraph (2) of subdivision (a), provides a new and just rule, namely, that in the case of property acquired by gift after December 31, 1920, the basis for computing gain or loss is the same as that which it would have in the hands of the donor or the last preceding owner by whom it was not acquired by gift. This means that if the property cost the donor $50, and at the time it was given to the donee it was worth $100, for which amount it is sold by the donee, the income of the donee would be $50 instead of nothing as under the present law.

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

(2)

NO. 95-1198

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

NOEL D. McNEEL, JOYCE A. McNEEL
GLEN NIGHTENGALE, RUBY NIGHTENGALE

PETITIONERS,

v.

COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO PETITION FOR WRIT OF CERTIORARI

NOEL D. McNEEL*
JOYCE A. McNEEL
P.O. Box 2
CHANDLER, ARIZONA 85244
(602) 671-6299

GLEN NIGHTENGALE*
RUBY NIGHTENGALE
10437 W. RUTH AVENUE
PEORIA, ARIZONA 85345
(602) 972-3431

*PETITIONERS, IN PROPRIA PERSONA

4 pp

The Petitioners hereby reply in support of their Petition for Writ of Certiorari. For the reasons set forth therein and in this Reply, this Court should issue the Writ to the Ninth Circuit Court of Appeals.

The Respondent has waived her right to respond to the Petition. Therefor she admits that, in affirming the Tax Court's grant of a Motion to Dismiss for Failure to State a Claim upon which Relief can be Granted, the Ninth Circuit found facts outside and contrary to the pleadings. The Ninth Circuit found that the Petitioners received Wages and that they worked for employers. These facts found by the Ninth Circuit resulted in a legal conclusion applicable to those facts, but which the Petitioners submit were contrary to the issue on appeal.

By waiving her right to respond to the Petition, the Respondent cannot dispute that the Ninth Circuit's decision was made in a way that conflicts with the relevant decisions of this Court. The facts plead in the Tax Court Petition were not challenged in any other way (by way of summary judgment, for example) this court must assume they are true. *Fla. Gen. Contractors v. Jacksonville*, 508 US _____, 124 L.Ed.2d 586, 599, 113 S.Ct. _____, (1993), citing *Lucas v. South Carolina Coastal Council*, 506 US _____, _____, n.3, 120 L.Ed. 798, 810-11, n.3, 112 S.Ct 2886 (1992); *Pennell v. San Jose*, 485 US 1, 7, 99 L.Ed.2d 1, 108 S.Ct 849 (1988). Given that presumption and this Court's standard of review, it is clear that it was inappropriate for the Ninth Circuit to have affirmed the Tax Court's grant of the Motion to Dismiss, and in doing so, to have ignored the facts plead in the Petition, to have found facts that were not otherwise plead or that could not be inferred from the pleadings and to have found facts that were contrary to the facts alleged in the Tax Court Petition.

Additionally, in finding those facts, the Ninth Circuit avoided the primary issue of whether the Petitioners'

labor, which is indisputably received as a gift from their Creator, is a "gift for income tax purposes." This Court has held that whether there has been a gift for income tax purposes is a question of fact, to be decided by the trier of fact. *Commissioner v. Duberstein*, 363 US 278, 285, 289-91, 4 L.Ed. 1218, 80 S.Ct. 1150 (1960). By failing to proceed on the facts plead in the Tax Court Petition, the Ninth Circuit decided this matter as a question of law, which is in a way that conflicts with *Duberstein*, supra.

Rule 10, Rules of the Supreme Court of the United States, states, in part: "Review on a writ of certiorari is not a matter of right, but of judicial discretion." However, that discretion is not unbridled and not so broad as to give the Court the authority to ignore Petitions that fall within the very stated reasons in Rule 10(a), (b), and (c), Rules of the Supreme Court of the United States. cf. *United States v. Rogers*, 461 US 677, 709, 76 L.Ed.2d 236, 103 S.Ct. 2132 (1983)

> To say that district courts need not always go ahead with a forced sale authorized by § 7403[1] is not to say that they have unbridled discretion. We can think of virtually no circumstances, for example, in which it would be permissible to refuse to authorize a sale simply to protect the interests of the delinquent taxpayer himself or herself.

By analogy, to say that the Supreme Court need not always exercise its discretion in granting a Writ of Certiorari is not to say that the Court has unbridled discretion. There should be virtually no circumstances in which it would be permissible to refuse to grant Certiorari where an appellate court blatantly violates its

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1/ Referring to § 7403 of the Internal Revenue Code.

own standards of review that are clearly in conflict with this Court's own standards and previous decisions, particularly when the appellate court does so in the name of protecting the revenue taxation system. If it takes this kind of blatant violation to protect the revenue taxation system, then it can only be concluded that the system was never intended to be enforced in the manner that the lower courts are so vehemently attempting to protect, knowing that this Court only grants certiorari two or three percent of the time and even less when the case involves substantive claims against the Internal Revenue Laws. At some point discretion must end and mandate begin. This is one such time.

Accordingly, and for the foregoing reasons, this Court should grant the Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 16 day of February, 1996.

NOEL D. McNEEL
c/o P.O. Box 2
CHANDLER, ARIZONA 85244
(602) 671-6299

JOYCE A. McNEEL

GLEN NIGHTENGALE
c/o 10437 WEST RUTH AVENUE
PEORIA, ARIZONA 85345
(602) 972-3431
PETITIONERS, IN PRO PER

RUBY NIGHTENGALE